

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE:

B-218610.2

DATE:

March 17, 1986

MATTER OF:

Vrooman Constructors, Inc.--Request
for Reconsideration

DIGEST:

1. Bidder's reliance on subcontractor's firm quotation that omitted an item is a mistake that must be corrected where there was no dispute about the nature of the error and the alleged intended bid fell within a narrow range of uncertainty, the upper end of which was still significantly below the next low bid.
2. Sworn statements from potential subcontractors corroborating claimant's alleged intended bid price are not required.

The Department of the Army, Corps of Engineers (Corps), requests reconsideration of our decision in Vrooman Constructors, Inc. (Vrooman), B-218610, Oct. 2, 1985, 85-2 CPD ¶ 369, recommending reformation of Vrooman's contract to allow correction of two mistakes in its bid under invitation for bids (IFB) No. DACA45-85-B-0043. The IFB was issued by the Corps for a construction project at F.E. Warren Air Force Base, Cheyenne, Wyoming. The Corps awarded the contract with the stipulation that Vrooman could present its preaward claim to an appropriate authority.

We affirm our prior recommendation that Vrooman's contract be reformed to correct the mistakes.

In its claim, Vrooman stated that minutes before bid opening, it had developed a written "Final Sheet" containing a base-line figure of \$8,950,800 based on summary sheets for the various elements of the bid. Anticipating possible lower price quotations from potential subcontractors for four elements (excavation, mechanical, electrical, and steel), Vrooman broke those elements out on its final work-sheet and left spaces for reductions. Based on telephonic quotations received from potential subcontractors close to the deadline for bids, Vrooman reduced the costs of the

mechanical and steel elements but failed to notice, in its haste, that the quotations covered only part of the steel and mechanical elements of work. Vrooman reduced each element by the difference between the previously entered amount and the new quotation, which had the effect of reducing the base-line price by \$515,800 to \$8,435,000, the amount actually bid.

Although the Corps determined that Vrooman clearly had made a mistake, the Corps decided that Vrooman had failed to meet its burden of providing clear and convincing evidence of the actual intended bid because its worksheets showed other quotations for the two elements that were a total of \$79,300 lower than the amounts for those elements in the base-line figure. The Corps relied on our decisions holding that a bid may not be corrected to reflect computations or recomputations performed after bid opening to cover items for which the bidder did not intend precise price factors before bid opening and denied Vrooman's request for bid correction.

In our decision, we held that in limited circumstances correction may be proper even though the intended bid cannot be determined exactly, if the intended bid is clearly and convincingly shown to fall within a narrow range of uncertainty below the next low bid and the price at the top of the range of uncertainty is not too close to the next low bid. See Sam Gonzales, Inc., B-216728, Feb. 1, 1985, 85-1 CPD ¶ 125; Fortec Constructors, B-203190.2, Sept. 29, 1981, 81-2 CPD ¶ 264; Western States Construction Co., Inc., B-191209, Aug. 29, 1978, 78-2 CPD ¶ 149. Because Vrooman's case presented such circumstances, we recommended reformation of its contract to correct the mistakes, limiting correction to reflect the bottom of the range of uncertainty.

The Corps contends that our Office applied the "narrow range of uncertainty" exception in an unprecedented circumstance, and that the evidence failed to support our decision. Further, the Corps contends that because the weight given to evidence is a question of fact and our Office has stated that it will not disturb an agency's decision unless there is no reasonable basis for the decision, we failed to give proper deference to the Corps' determination that correction was not warranted. The Corps also states that we failed to follow previous Comptroller General decisions without either distinguishing or overruling them.

Under applicable regulations, a mistake in bid alleged before award may be corrected where the bidder presents clear and convincing evidence establishing both the existence of the mistake and the bid actually intended, provided that the correction would not result in the displacement of a lower bid. Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.406-3(a) (1984).

As the Corps notes, the authority to correct mistakes after bid opening, but before award, is vested in the procuring agency. Because the weight to be given to the evidence in support of an asserted mistake is a question of fact, we will not disturb an agency's determination unless it lacks a reasonable basis. Schoutten Construction Co., B-215663, Sept. 18, 1984, 84-2 CPD ¶ 318.

In our prior decision, we did not question the Corps' factual determinations regarding the nature of the mistake or the uncertainty of the actually intended bid. In fact, we agreed with the Corps that the evidence was not clear and convincing that Vrooman would have used the subcontractors' quotations shown in its spread sheets before the reductions, since there existed other quotations which would have yielded a lower price. We disagreed, however, with the Corps' determination that correction was unavailable as a legal matter where it would involve a computation or recomputation performed after bid opening to include factors for which the bidder did not intend precise amounts.

The law recognizes that not every mistake is simply a clerical mistake or an error in transcribing actually intended figures and, therefore, the rule preventing corrections based on computations performed after bid opening should not be applied so rigidly as to preclude corrections of any mistakes aside from transcription errors. See Chris Berg, Inc. v. United States, 426 Fed. 2d 314, 316 (Ct. Cl. 1970). Correction may be allowed even though the intended bid price cannot be determined exactly, provided there is clear and convincing evidence that the intended bid would fall within a narrow range of uncertainty and remain low after correction. The sufficiency of the evidence to establish the intended bid is determined by reviewing the range of uncertainty, if any, in the intended bid and the closeness of the corrected bid to the next low bid. The closer an asserted intended bid, or the range of uncertainty is to the next low bid, the more difficult it is to establish that it was the bid actually intended. See Sam Gonzales, Inc., B-216728, supra. Correction may be disallowed when a corrected bid would come too close to the next low bid. R & R Contracting, Inc., B-217412, Mar. 1, 1985, 85-1 CPD ¶ 260.

The Corps argues that the narrow range of uncertainty exception has been applied for calculating only indirect costs, such as markup, in conjunction with the correction of a mistaken direct cost element for which there is clear and convincing evidence of the intended price factor. Regardless of whether the Corps is correct regarding the situations to which the exception has been applied, that does not mean that the exception is limited only to calculating indirect costs. As indicated above, the purpose of the rule is not to prohibit correction in any circumstances where there exists a mistake and the bidder is unable to establish the intended bid with absolute certainty.

In Vrooman's case, there was no dispute that the summary sheets and final worksheet showed an intended price of \$8,950,800 which included subcontractors' quotations for the items Vrooman later inadvertently omitted by using the incomplete subcontractors' quotations received shortly before bid opening. While portions of other quotations, by themselves or in combination with other quotations, might have yielded lower prices for the omitted items, thus creating some uncertainty as to the intended bid, the low range of uncertainty was a bid price of \$8,871,500--that is, \$79,300, or 1 percent less than the alleged intended bid of \$8,950,800. The alleged intended bid, which represents the top of the range of uncertainty, was \$586,200, or more than 6 percent less than the next low bid. Thus, Vrooman's alleged intended bid fell within a narrow range of uncertainty, the upper end of which fell significantly below the next low bid. Under the circumstances, we found, and still hold, that correction would not be inconsistent with the standard of clear and convincing evidence of the actually intended bid.

The Corps also contends that our decision is inconsistent with other decisions involving similar facts. For one thing, the Corps argues that Vrooman's consideration of last-minute price quotations entailed obvious risks and, therefore, any mistake was an error in judgment for which no relief is available. It is true that, generally speaking, the bidder must bear the responsibility for the submission of a bid, including ascertaining the exact cost of any supplies to be obtained from a supplier. Where the bidder knows it lacks a firm price from its suppliers but elects to submit a bid based upon the bidder's own estimate, the bidder must bear the risk that the actual supplier's cost will be higher than the bidder's estimate. Relief is not available for the bidder's judgmental error. Handy Tool & Manufacturing Co., Inc., B-195341, Jan. 19, 1981, 81-1 CPD ¶ 27. Where, however, the bidder's claim for relief is based upon a potential subcontractor's firm quotation

that omits an item, we have permitted relief, where otherwise proper, since the bidder was not aware of the risk in relying upon the quotation; thus, the subcontractor's error precluded the bidder from making a judgment. See Id.; Roebbelen Engineering, Inc., B-219929, Dec. 20, 1985, 85-2 CPD ¶ 691. Thus, Vrooman's mistaken reliance on subcontractors' firm quotations that omitted items constituted a type of mistake which may be corrected in appropriate circumstances.

The Corps also cites the following Comptroller General decisions, that involve omitted items, as being directly on point and in support of its position: Columbus Building and Supply Co., B-188477, Aug. 2, 1977, 77-2 CPD ¶ 70, and J.W. Creech, Inc., B-191177, Mar. 8, 1978, 78-1 CPD ¶ 186. Our decision in the present case is not inconsistent with those decisions. In Columbus Building and Supply Co., B-188477, supra, correction of the mistake in bid was disallowed because the protester's worksheets did not establish whether the bidder had intended before bid opening to price the allegedly omitted item.

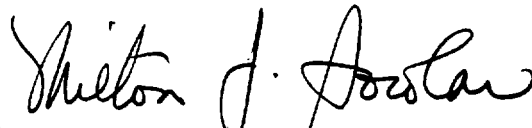
Also, in J.W. Creech, B-191177, supra, where the bidder mistakenly relied on a subcontractor's quotation that omitted an item while another higher quotation was available, we pointed out that it was clear that the bidder never considered the other quotation. We stated that the rule allowing bid correction does not extend to situations where the bidder discovers the omission of a factor after bid opening which the bidder did not have in mind before bid opening.

Those cases are inopposite, however, since Vrooman's worksheets and base-line figures clearly showed that Vrooman had considered price factors for the items and intended to price them using available quotations that established at least a reasonably certain narrow range for an actually intended bid price. Moreover, in J.W. Creech, Inc., B-191177, supra, an additional reason, not present here, precluding correction was that the bid, as corrected, would have come too close to the next lowest bid.

Lastly, regarding the Corps' assertion that sworn statements are needed to establish the scope and prices of Vrooman's potential subcontractors' quotations, we point out that the Corps initially determined that Vrooman's worksheets and explanations sufficiently established both that a mistake in fact occurred and the nature of the mistake. We did not question that determination. Moreover, contrary to the Corps' assertion, sworn statements from

potential subcontractors corroborating Vrooman's claims were not required. See Schoutten Construction Co., B-215663, supra.

We therefore affirm our prior decision.

for 
Comptroller General
of the United States